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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CLARICE J. LETIZIA,

Cross-complainant and Appellant,

v.

WENTWORTH, PAOLI, & PURDY, LLP,

Cross-defendant and Respondent.

G049384

(Super. Ct. No. 30-2012-00584165)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John C. Gastelum, Judge. Affirmed.

Miller Johnson Law, Jon B. Miller and Scott A. Johnson for Cross-complainant and Appellant.

Paoli & Purdy and William M. Delli Paoli for Cross-defendant and Respondent.

* * *

A jury found in favor of cross-defendant Wentworth, Paoli, & Purdy, LLP (WPP) and against cross-complainant Clarice J. Letizia on Letizia's first and second causes of action for nonpayment of wages and for a waiting time penalty, respectively. The jury awarded Letizia $1,165 on her third cause of action for unreimbursed travel expenses. On appeal Letizia contends the special verdict form was fatally defective, the jury did not properly deliberate on the special verdict form's third question, and the court abused its discretion by denying two of her motions in limine. We disagree with each of her contentions and affirm the judgment.

FACTS

We begin our factual recitation by stating two rules an appellant must follow. First, the appellant must include all "significant facts" in his or her brief, as opposed to only favorable evidence. (Cal. Rules of Court, rule 8.204(a)(2)(C).) Failure to state all of the evidence fairly in the brief waives the alleged error. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 737-738.) Second, because an appellant bears the burden of affirmatively demonstrating error (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610), the appellant must provide the reviewing court with a record adequate to evaluate his or her contentions (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132).

Letizia's statement of facts in her opening brief violates the first rule. She takes most of her recited "facts" from her own verified cross-complaint, and the few other facts she recites are equally favorable to her cause. She also omits part of the record that would be essential to adequately review her claim of error regarding the verdict form. Accordingly, we take our factual recitation from the record with no assistance from Letizia's appellate briefs.

Around January 2008, WPP hired Letizia as a salaried associate attorney. There was no written contract.

At a meeting on October 12, 2011, two WPP partners — Court Purdy and Theodore Wentworth — told Letizia they "were going to have to let her go, effective of [*sic*] that day." WPP's third partner — William Paoli — was not present at the October 12, 2011 meeting, but he understood Letizia was no longer an employee after that date.

At the October 12, 2011 meeting, WPP and Letizia reached an agreement, whereby WPP would pay Letizia "a severance package of six weeks salary," as well as health insurance for an agreed time period, *on condition* that Letizia assist with transitioning her cases to Purdy and Paoli. Specifically, Letizia was to receive the severance benefits only if she complied with her agreement to work with Purdy, Paoli, and the clients to smoothly transition her cases to Purdy and Paoli. Purdy envisioned Letizia would "work with staff to make sure no deadlines were pending, she would take care of any deadlines if she could, and she would provide the partners with an understanding as to what was necessary to perform on the case or cases." Purdy further anticipated that Letizia would facilitate introductions between Purdy, Paoli, and some clients, and would explain that the partners would be handling the cases in Letizia's absence. Purdy believed these goals could be accomplished by October 21, but agreed to allow Letizia access to the files until October 26, if necessary.

By mid-November, WPP had paid Letizia four weeks of salary pursuant to the agreement. But Purdy then learned that some clients were leaving the firm, and some clients were inquiring about leaving. Purdy informed Letizia that multiple clients had stated Letizia had contacted them and offered to represent them in the future. Purdy informed Letizia that the fallout from her interference had been disruptive and financially damaging, and had contravened "'the spirit of [their] agreement to work with each other in transferring the cases within the firm.'" WPP therefore cut off the severance and health insurance payments.

Letizia filed a complaint with the labor commission alleging WPP failed to pay her wages. For reasons not explained in the record, according to Letizia, the Labor Board claim was never adjudicated.

In July 2012, WPP filed a declaratory relief action against Letizia, seeking a judicial determination of the value of WPP's services in the cases Letizia took from the firm.[1]

In August 2012, Letizia filed a verified cross-complaint against WPP for failure to pay wages, a waiting time penalty for such failure, and failure to reimburse for expenses.[2] The first cause of action for nonpayment of wages itemized the wages and benefits WPP allegedly owed Letizia, and included two weeks of severance pay and insurance premiums owed. The second cause of action alleged WPP was liable to Letizia for a waiting time penalty for deliberately failing to pay her wages. The third cause of action sought reimbursement of Letizia's travel expenses.

After the parties presented their cases at trial, the court and counsel discussed the special verdict form to be presented to the jury. Letizia proposed a verdict form whose first two questions asked the jury whether Letizia "perform[ed] work for [WPP] after October 12, 2011, under the severance agreement," and whether WPP owed Letizia "wages, including unpaid salary, under the terms of the severance agreement." Letizia's proposed form was purportedly based on CACI No. VF-2700 (nonpayment of wages). But CACI No. VF-2700 asks whether the defendant owes the plaintiff "*wages* under the terms of the *employment*." (Italics added.) Letizia's form replaced CACI No. VF-2700's term, "employment," with "severance agreement," but retained the description of her claim as one for "unpaid wages, including unpaid salary." Thus, Letizia's

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[1] WPP's declaratory relief action against Letizia was settled prior to the trial on Letizia's cross-complaint at issue here.

[2] A fourth cause of action was dismissed prior to trial.

proposed verdict form was consistent with her legal theory: The severance agreement was a contract of employment. WPP had a contrary theory: Letizia became an independent contractor under the terms of the severance agreement, so that the protective provisions of the Labor Code did not apply.

After a lengthy discussion between the court and counsel on Letizia's proposed form — a discussion that brought the competing legal theories into sharp focus — Paoli offered to draft a few versions of a special verdict form. The court adjourned for the weekend. Unfortunately, the record is silent as to how the final verdict form was selected on the following Monday morning, because Letizia failed to designate a reporter's transcript reflecting any further discussion between the court and counsel regarding the final version of the special verdict form.

On the final special verdict form ultimately submitted to the jury, question No. 1 asked the jurors whether WPP terminated Letizia's employment effective October 12, 2011. Question No. 2 asked them whether Letizia and WPP entered into a contract on October 12, 2011. Question No. 3 asked them whether Letizia did all, or substantially all, of the things the contract required her to do. If the jury answered "no" to question No. 3, the jury was to "skip forward and answer" question No. 9. The skipped questions included, inter alia, what amount of unpaid salary and insurance premiums WPP owed Letizia under the October 12, 2011 contract. Question No. 9 asked whether Letizia incurred travel expenses as a WPP employee *or* at the direction of WPP after October 12, 2011.

To question No. 1 (whether WPP terminated Letizia's employment effective October 12, 2011), the jury answered "yes." To question No. 2 (whether Letizia and WPP entered into a contract on October 12, 2011), the jury answered "yes." To question No. 3 (whether Letizia did all, or substantially all, of the things that the contract required her to do), the jury answered "no." As a result of those answers, the jury found against Letizia on her wage claims in her first and second causes of action. To question

No. 9, i.e. (whether Letizia incurred travel expenses as a WPP employee or at the direction of WPP after October 12, 2011), the jury answered "yes." As to question No. 10, (what was the amount of the unpaid expenses), the jury answered "$1,165.45." The court awarded Letizia those unpaid expenses.

DISCUSSION

Letizia Has Forfeited Her Contention the Special Verdict Form Was Defective

WPP contends Letizia forfeited her challenge to the final special verdict form by failing to object below. Because she did not designate for inclusion in the reporter's transcript the portion of the court proceedings where WPP submitted a proposed final form to the court and the court approved it, we are unable to confirm Letizia's contention she had no opportunity to object to the final form.[3] As noted above, Letizia bears the burden of providing an adequate record to evaluate her contentions. Furthermore, because Letizia alleges WPP's proposed form was entirely new to the court and her counsel on August 12, 2013, it is speculative whether her objection would have been futile. For example, Letizia complains on appeal that the final form "nowhere asked the jury to determine whether Letizia had been an *employee* of WPP after October 12, 2011." Had Letizia objected to the final form's first question (which asked whether WPP terminated Letizia's employment effective October 12, 2011) and suggested the question be changed to, "Was Letizia an employee of WPP after October 12, 2011?", the court might well have granted her request. But we will never know. We lack an adequate record to determine the question.[4]

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[3] Letizia states WPP "lodged its new special verdict" form on August 12, 2013. Of the August 12, 2013 proceedings, Letizia designated only Paoli's closing argument and the jury polling discussion for inclusion in the reporter's transcript.

[4] In her reply brief, Letizia raises the contention that "'a reversal is

The Court Properly Denied Letizia's Request that the Instruction on Wages Specify Severance Payments

Letizia argues the court erred by refusing to instruct the jury that severance pay constitutes wages. She asserts that "California cases have held that severance pay is a form of 'wages' payable to employees."

WPP counters that despite the "severance" nomenclature, the October 12, 2011 agreement contemplated contractual payments to Letizia in return for her smoothly transitioning her cases to the WPP partners. It argues "the nature of a severance payment does not require any 1) additional agreement, or 2) any obligation to complete anything further for the benefit of the former employer." WWP alleges the law firm has "*never* had a policy of offering severance packages or agreements as a condition of employment or to any employee at the termination of the employee's employment with" the firm. It asserts the October 12, 2011 agreement was not a severance agreement offered to Letizia "by sole reason of her employment coming to a conclusion."

Letizia counters, inter alia, that WPP fails to cite legal authority for its proposition that the October 12, 2011 contract was not a severance package providing for "severance payments" coming within the definition of wages. On the other hand, Letizia's briefs — although they argue at length that "severance" pay has been held to constitute wages — never address the underlying question of whether the payments at issue here were "severance" pay within the meaning of the case law she cites. Indeed, Letizia's opening brief states in bold type, "Eligibility for severance pay depends on an

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required,'" despite the lack of an objection, if "the 'verdict is fatally inconsistent,' or 'is hopelessly ambiguous.'" "A special verdict is inconsistent if there is no possibility of reconciling its findings with each other." (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357.) Letizia inaccurately contends the jury's answer to question No. 9 on the special verdict form was inconsistent with its responses to the first two questions. She mischaracterizes the jury's "yes" answer to question No. 9 as a finding that "Letizia was acting as an *employee* of WPP" when she incurred travel expenses. In fact, question No. 9 asked whether Letizia incurred travel expenses as a WPP employee *or at the direction of WPP* after October 12, 2011.

employee performing labor *before* a company's decision to end the employment relationship" (italics added), thus supporting WPP's argument that entitlement to "severance" pay characterized as "wages" is triggered solely by an employee's termination with no requirement the terminated employee complete anything further for the former employer's benefit.

"'A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him [that] is supported by substantial evidence.'" (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1217.) "'Instructions should state rules of law in general terms and should not be calculated to amount to an argument to the jury in the guise of a statement of law.'" (*Ibid.*)

The court instructed the jury with the pattern instruction CACI No. 2700 (essential factual elements of nonpayment of wages), without modification, as follows. "Clarice Letizia claims that [WPP] owes her unpaid wages. To establish this claim, [Letizia] must prove all of the following: [¶] 1. That [Letizia] performed work for [WPP]; [¶] 2. That [WPP] owes [Letizia] wages under the terms of the employment; and [¶] 3. The amount of unpaid wages. [¶] 'Wages' includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, *or some other method*." (Italics added.)

Previously, Letizia had asked the court to modify CACI No. 2700 by replacing its final phrase, "or some other method," with her proposed language. But the record is silent on the exact language Letizia proffered. The clerk's transcript contains only the instructions as given. In the clerk's transcript's copy of CACI No. 2700 as given, the final phrase (apparently Letizia's proffered language) is blacked out and replaced with the handwritten words "or some other method" to accord with the pattern instruction. Letizia does not inform us of her actual proposed language, nor does she provide us with any record reference for that information.

We can garner the general *substance* of Letizia's proposed modification of CACI No. 2700 from the reporter's transcript. During the discussion between the court and counsel finalizing the instructions, Paoli argued that Letizia had modified CACI No. 2700 "to include nondiscretionary bonus and/or severance pay of benefits and insurance." Paoli stated he would prefer the instruction to "read exactly as CACI has it." Letizia's counsel disagreed, arguing "nondiscretionary bonuses or severance pay" should be included in the instruction because it was "on point to the case" and "part of" CACI No. 2700's directions for use.

CACI No. 2700's "Directions for Use" states in relevant part: "Depending on the allegations in the case, the definition of 'wages' may be modified to include additional compensation, such as earned vacation, nondiscretionary bonuses, or severance pay."

The court ruled Letizia was free to argue that the term "wages" includes nondiscretionary bonuses or severance pay. But the court declined to modify the pattern instruction, noting that CACI No. 2700's directions state the definition "may" be modified, not "shall be modified," and that the pattern instruction's phrase "or some other method" was sufficient to allow counsel to argue Letizia's theory.

Letizia has failed to carry her burden of demonstrating reversible error. First, the record is inadequate for us to determine whether the proposed language accurately stated the law.

Second, Letizia fails to provide us with reasoned argument and legal authority on whether the court or the jury should have decided the foundational question of whether the payments at issue here were "severance pay" within the meaning of CACI No. 2700's directions for use, i.e., whether the issue was a factual or legal one. (Cal. Rules of Court, rule 8.204(a)(1)(B).) We note, for example, that CACI No. 3704 sets forth the factors to be considered by the jury in deciding the *factual* question of whether an agent was an employee of the defendant (and specifies the most important factor is

whether the defendant had the right to control how the agent performed the work, rather than just the right to specify the result.) The jury was not instructed with CACI No. 3704, although that might have gone a long way toward clarifying the key issue in this case.

Third, regardless of whether the severance pay issue was a factual or legal question, or a mixed query of law and fact, Letizia's proposed instruction constituted an argument to the jury in the guise of a statement of law. In other words, it presupposed that the payments at issue here were severance pay within the meaning of the instruction governing nonpayment of "wages," rather than submitting the contested question to the appropriate decision maker.

Fourth, Letizia's reply brief suggests the issue is a factual one, stating the "evidence established that the agreement entered on October 12, 2011, was seen by the parties as being a severance package." By failing to recite any of the evidence supporting WPP's claim the parties agreed at the October 12, 2011 meeting that Letizia would work for the firm thereafter as an independent contractor, Letizia has waived the claim.

The Court's Denials of Letizia's Motions in Limine Were Not Prejudicial

"The court's ruling on a motion in limine is reviewed for abuse of discretion." (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1493; see also *R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 385 (conc. & dis. opn. of Fybel, J.) [standard of review is abuse of discretion unless grant of motion in limine excludes all relevant evidence "and thereby disposes of an entire cause of action"].) "A ruling that constitutes an abuse of discretion has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.'" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) "'In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its

discretionary determinations ought not be set aside on review.'" (*Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 762.)

1. Letizia's Motion in Limine No. 4: Quality of Letizia's Work

Letizia's motion in limine No. 4 asked the court to bar WPP "from introducing any evidence or testimony regarding the quality of her performance as an employee during the tenure of her employment with the law firm." Her stated grounds for exclusion were Evidence Code sections 350 (relevance), 787 (character evidence), and 352 (undue prejudice).

At the hearing on the motion, Purdy asserted that WPP could not afford to employ Letizia after October 12, 2011, because she had committed many mistakes that caused the firm to be fined and sanctioned, including a $46,000 sanction. He also stated this evidence was relevant to her veracity because her verified cross-complaint contained statements about her performance with WPP and why the firm let her go. He noted the case would involve primarily "he said/she said" evidence and therefore Letizia's credibility was at issue.

The court ruled WPP could introduce the evidence because it related to Letizia's credibility, but cautioned WPP to "keep this short and sweet."

A trial court's decision will be affirmed if it is correct on any theory of law applicable to the case. (*Estate of Beard* (1999) 71 Cal.App.4th 753, 776.) Here, the court's ruling was not an abuse of discretion. Evidence of Letizia's poor performance as an associate attorney for WPP supports Purdy's and Paoli's testimony the firm fired Letizia, effective October 12, 2011. WPP alleged that, thereafter, Letizia was an independent contractor with a limited scope of work. Thus, evidence that Letizia's job performance was unsatisfactory to WPP was relevant to the disputed issue of whether Letizia was an employee, as opposed to an independent contractor, after October 12, 2011.

Moreover, even if the court erred, the admission of the evidence on Letizia's work performance did not prejudice her. (Cal. Const., art. VI, § 13.) Over Paoli's objection, the court instructed the jury with a modified version of Letizia's special instruction No. 3, which stated: "The law does not permit an employer to make reductions in an employee's salary based upon the quality or quantity of that employee's work."

Furthermore, Letizia omitted her own testimony and cross-examination from the reporter's transcript on appeal, and we are therefore unable to evaluate WPP's assertion Letizia put the issue of the quality of her work into contention. (*Aguilar v. Avis Rent A Car System, Inc., supra,* 21 Cal.4th at p. 132.) "[A]lthough '"evidence of a specific instance of a witness' conduct is inadmissible under Evidence Code section 787 to impeach the witness as proof of a trait of his character [it] may become admissible to impeach the witness pursuant to Evidence Code section 780, subdivision (i), by proving *false* some portion of his testimony."'" (*Andrews v. City and County of San Francisco* (1988) 205 Cal.App.3d 938, 946.) "California's Evidence Code, adopted in 1965, did away with the common law rule [that a party cannot be impeached on a collateral fact]. Section 351 states 'all relevant evidence is admissible' and section 780 provides that 'in determining the credibility of a witness' the trier of fact 'may consider . . . : [¶] . . . [¶] (i) The existence or nonexistence of any fact testified to by him.' The effect of these two statutes 'is to eliminate this inflexible rule of exclusion.' [Citation.] In its place 'the court has substantial discretion to exclude collateral evidence' under section 352." (*People v. Morrison* (2011) 199 Cal.App.4th 158, 164.)

In a related argument, Letizia contends that, because the court admitted evidence of her possible application of the wrong law to an Ohio class action suit, the court abused its discretion by denying her request for a jury instruction on the inapplicability of the "fluctuating work week formula" "for calculating overtime in" the Ohio class action. Inter alia, her bench brief alleged the fluctuating work week formula

"cannot be applied retroactively" and instead the general rule under the Federal Labor Standards Act and Ohio law (Ohio Rev. Code § 4111.03(A)) applied. The court refused to give the instruction because it was "totally confusing," but stated it could be "a subject for closing argument."

We do not find in the record Letizia's proposed jury instruction on the fluctuating work week formula nor does Letizia point us to any record references other than to her bench brief and the court's brief discussion of the matter. Based on these latter two sources, however, it seems clear the instruction would have been confusing, distracting, and possibly time consuming for the jury. The court's refusal to instruct the jury on the alleged inapplicability of the fluctuating work week formula to the Ohio class action was neither irrational nor arbitrary.

2. Letizia's Motion in Limine No. 1: Labor Board Claim

Letizia's motion in limine No. 1 asked the court to order WPP "to refrain, during trial, from making any reference to the Labor Board Claim, and to instruct its witnesses and attorneys to NOT mention the Labor Board Claim." Her motion alleged her Labor Board claim for unpaid wages was never "adjudicated, and no hearing or determination was ever made, on the merits."

At the hearing on Letizia's motion in limine No. 1, Purdy stated WPP wanted "the jury to understand . . . that a claim with the Labor Board was made by Ms. Letizia for these same claims . . . , and that we attended a hearing with the Labor Board, and for whatever reason — and Ms. Letizia can explain it if she wishes — the claim was either withdrawn or denied and [WPP] was not held responsible" for those claims.

The court ruled WPP could mention "that these claims briefly were raised in the board meeting, there was no resolution there and that is why we're here."

The court's ruling was an abuse of discretion. The labor commissioner's opinion, whether or not it advised Letizia she would lose if she pursued her Labor Board claim (as WPP asserts), was irrelevant and, in addition, inadmissible hearsay. (Evid. Code, §§ 210, 350, 1200.)

The ruling did not prejudice Letizia, however. (Cal. Const., art. VI, § 13.) She refers us to only two points in the record where the issue came up: First, Purdy asserted in his opening statement that "the California Labor Board has not made any finding that [WPP is] responsible for paying any of these damages." Second, Paoli asserted in his closing statement that Letizia "took us to the Labor Board, didn't prevail there."[5]

Paoli's assertion in his closing statement that Letizia did not prevail at the Labor Board improperly suggests she was the losing party. But Letizia did not object or move to strike Paoli's comment, thereby forfeiting the issue on appeal. Moreover, the court instructed the jury that "[w]hat the parties say in closing argument is not evidence."

Juror No. 6's Vote on Question No. 3 of the Special Verdict Form

Letizia contends the jury's verdict on question No. 3 "was not reached through deliberation" because Juror No. 6 did not vote on the question.

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[5] WPP, on the other hand, asserts Letizia first elicited the evidence when her attorney asked Purdy on redirect examination, "Just so I have the sequence of events correct, is it correct that your [declaratory] relief action was filed after Ms. Letizia made a complaint to the Labor Commission about the failure of the firm [to] pay wages?"

The jury answered "no" to question No. 3 of the special verdict form, which asked, "Did [Letizia] do all, or substantially all, of the significant things that the [October 12, 2011] contract required her to do?" When the jurors were polled individually on their answers to question No. 3, Juror No. 6 stated he had not answered the question because he had answered "no" to question No. 2 and was directed by the special verdict form to skip question No. 3. The court told Juror No. 6 he was still required to answer question No. 3. Juror No. 6 then stated, "I would say no."

At the end of the polling on question No. 3, the court stated there were only eight votes to support the verdict. The court acknowledged the polling process was "confusing." The court explained to the jurors that although the group response to question No. 3 was "no," the current polling required a juror to say "yes" if they voted "no" on question No. 3. Juror No. 6 then stated, "According to what you say, I should have answered 'yes.'" Juror No. 6 confirmed he "wrote down here 'no,' but according to what you say, it reverse. I should have said 'yes' now."

Juror No. 6 again noted he did not vote on question No. 3 because the form instructed him to skip to question No. 9 if he answered "no" to question No. 2. The court explained that if the group answer to question No. 2 was "yes," even if some people disagreed, then the jurors were to answer question No. 3. Juror No. 6 stated, "Now I see." The court confirmed with Juror No. 6 that he marked his ballot "no" for question No. 3. Juror No. 6 stated, "Right." The court then stated the vote on question No. 3 was nine to three.

Letizia asserts Juror No. 6 did not vote on or answer question No. 3, because he voted no on question No. 2. She omits to even mention any of the colloquy between the court and Juror No. 6 that transpired after Juror No. 6 originally stated, "I would say no." Letizia has thereby waived her contention that Juror No. 6 "did not vote."

Letizia further contends the court erred by asking Juror No. 6 "to vote on the spot," instead of sending the jury back for more deliberations. We reject this

contention. Code of Civil Procedure section 613 "indicates a jury may decide a case immediately following the court's instructions." (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 309-310.) A "'party's constitutional right to have his case decided by a jury [does not include] the right to compel jurors to discuss issues which they have chosen to decide without discussion.'" (*Id.* at p. 310.) *Vaughn v. Noor* (1991) 233 Cal.App.3d 14, on which Letizia relies, is distinguishable since it involved the substitution of an alternate juror onto the jury after the jury had reached a yes verdict on liability, but before the jury had agreed on damages. (*Id.* at p. 18.) *Vaughn* "held only that it was error not to instruct the jury to begin deliberations anew after the alternate was seated." (*Mendoza*, at p. 311.) Here, Juror No. 6 was not an alternate juror.

Prior to the jurors' deliberations, the court instructed them with CACI No. 5012, in relevant part as follows: "All 12 of you must deliberate on and answer each question. At least 9 of you must agree on an answer before all of you can move on to the next question." Juror No. 6 either did not understand the part of the instruction requiring all 12 to deliberate on each question, or simply forgot that part of the instruction. But despite the misunderstanding, and the subsequent confusion in answering the poll of the jury, it clearly appears that Juror No. 6 had concluded that if the parties had in fact entered into a contract on October 12, 2011, as all of the other jurors had found,[6] Letizia had not done all of the things that contract required her to do. There was no prejudicial error.

[6] Juror No. 6 was the lone "no" vote on the first two questions.

DISPOSITION

The judgment is affirmed. WPP shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.